No. 15037

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEONARD CRUZ-SANCHEZ,

Appellant,

vs.

ROBERT ROBINSON, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, MERRIL O'TOOLE, Regional Commissioner, San Pedro California,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Jurisdiction.

On August 15, 1955, appellant, plaintiff below, sought a writ of habeas corpus in the District Court for the Southern District of California alleging that appellant was being detained unlawfully by appellees [R. 4].[1] The defendant at the time was Albert Del Guercio, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, and Merril O'Toole, Regional Commissioner, San Pedro, California.

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[1]References to the printed Transcript of Record will be indicated "R." References to appellant's brief will be indicated "Br."

On September 12, 1955 a hearing was had in the District Court [R. 58] and a judgment was entered in favor of defendants denying the relief prayed for in the plaintiff's petition and the writ was discharged [R. 62].

Judgment denying such relief was filed, docketed and entered on September 22, 1955 [R. 65].

On September 22, 1955 plaintiff filed an action for declaratory judgment and judicial review [R. 66].

On October 5, 1955 defendants filed a notice of motion and motion to dismiss [R. 69].

On December 16, 1955 an order of dismissal was made by the Honorable William M. Byrne, District Judge, granting the motion to dismiss, which order was filed, docketed and entered on the same date [R. 71].

The court below had jurisdiction under the provisions of Section 10 of the Act of June 11, 1946 commonly referred to as the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A., Section 1009 (*Shaughnessy v. Pedreiro,* 349 U. S. 48 (1955)); and its judgment being a final decision jurisdiction is conferred upon this court by 28 U. S. C., Section 1291.

Statement of the Case.

Appellant is an alien, a native and citizen of Mexico [R. 59, 45-46]. He was lawfully admitted to the United States in 1933 and has been a resident of the United States continuously since that time. On July 21, 1952 a warrant of arrest [R. 42] was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California charging that the appellant was subject to deportation under the Immigration and Nationality Act in that he was an immigrant not in possession of a

valid immigration visa and not exempted from the presentation thereof by said Act or Regulations thereunder; and that after entry he was convicted of a crime involving moral turpitude committed within five years after said entry; to wit burglary, second degree, and grand theft [R. 42]. The last entry of appellant was in March, 1950 [R. 46].

The record shows that appellant pleaded guilty in the Superior Court of the State of California in and for the County of Madera for the crime of burglary in the second degree committed on or about March 21, 1952 and was sentenced by said court on May 9, 1952 to imprisonment in the State Prison for the term prescribed by law [R. 47-48; Br. 5].

On March 5, 1953 a deportation hearing was held at California Institute for Men, Chino, California [R. 34; Br. 6].

On March 5, 1953 the special inquiry officer who presided at the aforementioned deportation hearing rendered his decision ordering that the plaintiff be deported from the United States pursuant to law on the charge contained in the warrant of arrest. An administrative appeal was taken by appellant from the decision of the special inquiry officer to the Board of Immigration Appeals and on June 16, 1953 said Board dismissed appellant's appeal [R. 19].

On August 13, 1953, based upon the aforementioned order of deportation a warrant of deportation was issued [R. 17] by the District Director, Immigration and Naturalization Service, Los Angeles, California, directing that the appellant be deported from the United States.

On August 15, 1955 the plaintiff filed a petition for a writ of habeas corpus in the court below, seeking an order releasing plaintiff from detention [R. 3].

On August 15, 1955 an order to show cause was issued by the lower court for the defendant to show cause why a writ of habeas corpus should not issue. The show cause was set for September 6, 1955 [R. 5].

On September 12, 1955 a hearing on the order to show cause was held in the court below [R. 58] and a judgment was entered in favor of the appellee against appellant denying the relief prayed for in the appellant's petition and discharging the writ. Judgment was entered on September 22, 1955 [R. 63].

On September 22, 1955 plaintiff filed an action for declaratory judgment and judicial review in which petition plaintiff alleged that there had been a previous application for a writ of habeas corpus which had been denied [R. 68].

On October 5, 1955 defendants filed a notice of motion and motion to dismiss the petition for declaratory judgment pursuant to the authority set forth in Federal Rules of Civil Procedure, Section 12(b)(1) and on October 11, 1955 plaintiff filed a supplemental motion to dismiss on the grounds that the petition failed to state a claim on which relief could be granted pursuant to the authority set forth in Federal Rules of Civil Procedure, Section 12(b)(6).

On October 17, 1955 the court below Honorable William M. Byrne, Judge presiding, ordered the petition for declaratory relief dismissed [R. 71]. On November 17, 1955 the court filed a memorandum of decision (Appendix I).[2]

On December 20, 1955 plaintiff filed notice of appeal [R. 72]. This appeal from that judgment raises the following questions: (1) Is a habeas corpus an exclusive relief from an administrative order of deportation. (2) Is a denial of habeas corpus in a previous proceedings an estoppel for subsequent relief under Section 10 of Administrative Procedure Act. (3) Did Congress grant to an alien in addition to the rights to a writ of habeas corpus the relief of judicial review and is such right to relief of judicial review a constitutional right which Congress cannot suspend.

Statutes Involved.

Section 10 of the Act of June 11, 1946 (Administrative Procedure Act).

60 Stat. 243, 5 U. S. C. A., Section 1009, Section 242(b) of the Immigration and Nationality Act of 1952 (8 U. S. C. A. 1252(b)).

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[2]The memorandum of decision of Judge William M. Byrne is attached hereto as Appendix I.

ARGUMENT.

I.

Summary.

The standard embodied in the Immigration and Nationality Act requiring reasonable, substantial and probative evidence to support an order of deportation is not new in deportation proceedings but was applied by courts prior to this Act in habeas corpus proceedings. In determining whether this standard has been met a court of review will not substitute its judgment for that of the Immigration authorities but will invalidate an order of deportation only if the alien would have been entitled to a directed verdict in his favor had the issue of his deportability been tried before a jury.

Following the issuance of the warrant for deportation of the alien a judicial review of the deportation proceedings was obtained by way of a petition for a writ of habeas corpus. No serious question is raised by the appellant as to the propriety of the hearing on the writ of habeas corpus and upon that hearing the court determined that the requirements of Section 242(b) of the Immigration and Nationality Act, 8 U. S. C. A. 1252(b) were met and that the hearing for deportation proceedings were fair and in accordance with the constitutional rights of the appellant. Further, the court found that there was reasonable, substantial and probative evidence to support the order of deportation and the deportation proceedings were fair and in accord with the constitutional rights of the petitioner.

The major question presented by this appeal is whether the appellant may have a redetermination of the same issues previously adjudicated on the hearing on the writ of

habeas corpus. It is contended by the appellant that he is entitled to identical judicial review in both a habeas corpus proceedings and in a subsequent declaratory relief action.

II.

Appellant Is Entitled to Judicial Review by Way of Habeas Corpus or by Way of an Action for Declaratory Relief, but Such Remedies Are Mutually Exclusive.

A finding by a court on a writ of habeas corpus conclusively establishes appellant's deportability and precludes his attempt to relitigate the matter by a declaratory relief action.

The present suit is in no sense a new action; the issues tendered here have already been disposed of in a prior litigation. It was determined by the court in this prior litigation that the petitioner had a fair hearing in accordance with his constitutional rights and that the provisions of Section 242(b) of the Immigration and Nationality Act, 8 U. S. C. A. 1252(b) had been complied with. This prior litigation conclusively established that the order of deportation was valid. This is so either upon the doctrine of *res judicata* or upon the legal principle that controlling weight should be given a prior judicial determination of the same issues between the same parties or their privies.

Appellant relies upon the authority of *Shaughnessy v. Pedreiro,* 349 U. S. 48 which he contends authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two* judicial reviews of the same administrative proceeding. While it is true that the *Pedreiro* case *(supra)* held, "That there is a right

of judicial review of deportation orders other than by habeas corpus" and that an action for declaratory relief is an appropriate remedy to obtain a review, this holding does not state that such remedies are consecutive. The clear holding is that judicial review may be had *either* by habeas corpus or an action for declaratory relief.

Jurisdiction of the court to review is predicated on Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. A. 1009(c). This Section provides in part:

> "The form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs for prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction."

The net effect of a petition for declaratory relief and judicial review is to seek from the court the same review as was had previously on a writ of habeas corpus. The scope of review on the writ of habeas corpus or the scope of review in an action for review under the Administrative Procedure Act is the same, irrespective of which procedure is employed. *United States of America ex rel. Dryzvitch v. Holton,* 222 F. 2d 840.

It could hardly be contended that Congress intended to permit successive judicial review of the same administrative action in each of the various forms authorized with resultant endless litigation and indefinite postponement of execution of administrative order.

III.

Where Appellant Seeks Review on the Same Facts as Previously Determined on Hearing on a Writ of Habeas Corpus the Doctrine of Res Judicata Applies.

There is no argument with the contention of the appellant that *res judicata* does not apply to habeas corpus. Appellees agree that this is the correct statement of the law. However, we are here faced not with an action for habeas corpus followed by a subsequent action for habeas corpus but rather with an action for habeas corpus followed by a different and entirely distinct action for declaratory relief. Cases which pass upon the proposition that habeas corpus proceedings are not bound by the rule of *res judicata* deal with existing habeas corpus cases and their relationship to prior habeas corpus cases. In the case of *Lapides v. Clark,* 176 F. 2d 619, 621 (1949), cert. den. 338 U. S. 860. The court stated that the appellant had overlooked the fact that the present action was for declaratory judgment and said:

> "We wonder what justification there can be for this additional and needless litigation with all its trouble, expense and delay which the law so much abhors."

In that case the court affirmed the District Court's order dismissing the complaint. A similar result was reached in *Heikkila v. Barber,* 216 F. 2d 407, 409 (9th Cir., 1954), cert. den. 349 U. S. 927 (1955). In that case the Court of Appeals held:

> "Appellant's present suit is no real sense a new action. It is but a repetition or continuation of the litigation heretofore unsuccessfully urged. We have no alternative but to hold that the earlier decision of the Supreme Court is *res judicata.*"

Here too petitioner is attempting to repeat or recontinue the litigation which he heretofore unsuccessfully waged. There must be an end to litigation. *Wong Doo v. United States,* 265 U. S. 239.

In *Marcello v. Bonds,* 349 U. S. 302 the court discusses the various elements with respect to notice, right of counsel, right to present evidence and to cross-examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of review is exactly the same, whether the remedy pursued is habeas corpus or an action for declaratory relief.

Even assuming *arguendo* that *res judicata* is not technically applicable the same result would be required by the controlling weight which must be given to the prior judicial determination of deportability. In *Wong Doo v. United States, supra,* the court after pointing out that *res judicata* did not apply in habeas corpus proceedings said:

> ". . . it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing of the first petitions; and if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in supporting a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows

that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution has already been postponed almost four years."

In *Carpathiou v. Jordan,* 153 F. 2d 810, 811 (7th Cir., 1946), cert. den. 328 U. S. 868, the court in passing on successive writs of habeas corpus said:

> "The District Court properly exercised its sound discretion in giving controlling weight to the prior decision and in dismissing the petition [citing cases]. Litigation must end and cannot be continued indefinitely in this manner [citing *Wong Doo v. United States, supra*]."

In the leading case of *Dorsey v. Gill,* 148 F. 2d 857, 869-870 (1945), cert. den. 325 U. S. 890, the court stated:

> "Though the doctrine of *res judicata* does not apply to habeas corpus cases, the fact that the same issues have been decided in a former proceeding may and sometimes should as a matter of judicial discretion be given controlling weight."

To the same effect, see *Beard v. Bennett,* 114 F. 2d 578, 581 (1940), in which case the court stated:

> ". . . we think the fact that appellant has applied for substantially identical relief in another coordinate form having admitted jurisdiction practically contemporaneous with his application here and that such form had determined the application adversely to him should preclude him from having the relief which he seeks in this proceeding. The trial court unquestionably has discretion in such circumstances to decline to exercise his jurisdiction if it were admitted to exist."

Conclusion.

Wherefore, for the reasons set forth above it is respectfully submitted that the judgment of the District Court in favor of the appellee denying the relief prayed for in the appellant's petition should be affirmed.

Respectfully submitted,

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APPENDIX I.

United States District Court, Southern District of California, Central Division.

Leonard Cruz-Sanchez, Petitioner, vs. Robert Robinson, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, Merril O'Toole, Regional Commissioner, San Pedro, California, Respondents. No. 18785-WB.

Filed Nov. 17, 1955; Clerk, U. S. District Court, Southern District of California.

Memorandum of Decision

Cruz-Sanchez filed this action for declaratory judgment seeking the review of a final order of the Immigration and Naturalization Service in which he was found to be a deportable alien and ordered deported from the United States.

The defendants, in their motion to dismiss, concede that an action for declaratory judgment is a proper form of proceeding to obtain judicial review of an order of deportation,[1] but they contend that no relief can be granted here as the claim of the plaintiff has previously been adjudicated, *i.e.* he has already had his judicial review.

Approximately two months prior to the filing of this action the plaintiff filed a petition for a writ of habeas corpus and was accorded a judicial review of the deportation proceedings he attacks in the present suit. Following a hearing on the writ and the return thereto, the court made and filed findings that the hearing and the final

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[1]Shaughnessy v. Pedreiro, 349 U. S. 48.

order of deportation complied with the conditions and provisions of Section 242(b) of the Immigration and Nationality Act (8 U. S. C. A. 1252(b)); that the deportation proceedings relating to the plaintiff were fair and in accord with his constitutional rights; that there was reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation and the warrant of deportation. Accordingly judgment was entered discharging the writ.

The question here is whether Cruz-Sanchez may have a re-determination of the same issues previously adjudicated. He relies on Shaughnessy v. Pedreiro, 349 U. S. 48, and contends that it authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two* judicial reviews of the same administrative proceeding. That is not the holding of the Pedreiro case. The Pedreiro court held "that there is a right of judicial review of deportation orders other than by habeas corpus" and that an action for declaratory relief is an appropriate remedy to obtain such a review. The clear holding is that judicial review may be had *either* by habeas corpus *or* an action for declaratory relief. The Administrative Procedure Act provides[2] the "form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs for prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." It could hardly be contended that Congress intended to permit successive judicial reviews of the same administrative action in each of the various forms author-

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[2]5 U. S. C. A. 1009(b).

ized, with resultant endless litigation and the indefinite postponement of execution of the administrative order. The conclusion is inescapable that Congress intended but one judicial review of administrative action.

Cruz-Sanchez says it is elementary that the doctrine of *res judicata* does not apply to habeas corpus. That is a correct statement of the law[3] which is founded upon the recognition of habeas corpus as the privileged writ of freedom. It is because of this status that courts are not foreclosed from considering successive applications for the extraordinary writ.[4] However, we are not concerned with the application of the doctrine of *res judicata* to habeas corpus proceedings. This is an action for a declaratory judgment and not an application for the Great Writ.

Ordinarily the office of habeas corpus is exhausted when it is ascertained that the agency or court under whose order the petitioner is being held had jurisdiction to act and the requirements of due process were observed.[5] Judicial review of an administrative proceeding may be

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[3]Wong Doo v. United States, 265 U. S. 239; Salinger v. Loisel, 265 U. S. 224; Collins v. Loisel, 262 U. S. 426.

[4]To curtail the abuse of the writ, Congress in 1948 adopted Section 2244 of Title 28 U. S. C. A. reading as follows: "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." (See Revisor's Note to the effect that the purpose of the section is to prevent suing out successive and repetitious writs).

[5]Woolsey v. Best, 299 U. S. 1.

had in habeas corpus because the Administrative Procedure Act so provides (5 U. S. C. 1099(b)) and the scope of habeas corpus is enlarged accordingly. The scope of judicial review of deportation proceedings whether invoked by habeas corpus or an action for declaratory relief is delineated by section 242(b) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252(b)). See Marcello v. Bonds, 349 U. S. 302. Section 242(b) sets forth various requirements with respect to notice, right to counsel, right to present evidence and to cross examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of the review is exactly the same whether the remedy pursued is habeas corpus or an action for declaratory relief.

The plaintiff has been afforded judicial review and a court of competent jurisdiction has determined that the deportation proceedings complied with the conditions and provisions of Section 242(b). A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies.[6]

Although the defense of *res judicata* should ordinarily be pleaded; where, as here, the complaint on its face shows the prior proceedings, such defense may be presented by motion to dismiss.[7]

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[6]Wyoming v. Colorado, 286 U. S. 494; Continental Oil Co. v. Jones, 176 F. 2d 519; Oklahoma v. United States, 155 F. 2d 496; Restatement, Judgments, 568.

[7]Cuff v. United States, 64 F. 2d 624.

An alien is not entitled to repetitious judicial reviews of deportation proceedings. If discontented with the result of the first judicial review, his remedy is by appeal. The motion to dismiss is granted. Counsel for defendant to prepare, serve and lodge a formal order pursuant to local rule 7.

Dated, Los Angeles, California, November 17, 1955.

WM. M. BYRNE,
United States District Judge.

Received Nov. 17, 1955; U. S. Attorney, Los Angeles, Calif.